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IN THE

Supreme Court of the United States

October Term, 1961

No. 177

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

On Appeal From the United States District Court
For the Eastern District of New York

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

HENRY HONEYWOOD, *et al.*,

Appellants,

v.

NELSON A. ROCKEFELLER, etc., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the three-judge district court denying the application of these appellants for a preliminary injunction has not been reported. A copy thereof is set forth in Appendix A, *infra*.

Jurisdiction

On May 10, 1962 a hearing was held on the motion made by the plaintiffs herein for a preliminary injunction before a three-judge statutory court. On May 14, 1962 the said Court denied plaintiffs' motion without opinion. A copy of this decision is set forth in Appendix B, *infra*.

Upon submission of a proposed order by plaintiffs, the Learned Court issued an amended opinion as set forth in Appendix A, *infra*. An order was duly entered by the three-judge statutory court on May 22, 1962, denying plaintiffs' application for a preliminary injunction.

Plaintiffs' motion was for a preliminary injunction, restraining the defendants, their agents, servants and successors in office from the enforcement and execution of Chapter 980 of the 1961 Laws of the State of New York, claiming said Act to be in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States. A Notice of Appeal to this Court was filed in the district court on May 23, 1962. Jurisdiction of this Court to review on direct appeal the decision of the District Court denying the application for a preliminary injunction is conferred by 28 U. S. C. 1253.

Questions Presented

Whether the Learned Court presiding on plaintiffs' application for a preliminary injunction, abused its discretion in denying said application?

Whether in the light of the *uncontradicted* proof submitted by the plaintiffs, as indicated by the record herewith of the hearing held on May 10, 1962, wherein plaintiffs clearly established a constitutional violation of their rights under the Fourteenth and Fifteenth Amendments to the Constitution of the United States, in the form of a five (5) mile "color line" between Negro and White, under Chapter 980 of the 1961 Laws of the State of New York, and pursuant to which approximately nine thousand (9,000) Negroes were being deprived of their right to vote in the newly proposed Sixth Congressional District, a preliminary injunction should not have been issued as a matter of law?

Statement

a) The Complaint

This action was brought under the Civil Rights Act, U. S. C. Title 42, Sections 1981 and 1983, and under U. S. C. Title 28, Sections 1343, 2201 and 2202. The individual appellants are Negro citizens and voters in the present Fourth Congressional District (destined to become the newly proposed Sixth Congressional District, pursuant to Chapter 980 of the 1961 Laws of the State of New York). They are residents in an area (designated as area "A" of Plaintiffs' Exhibit No. 3 attached to the complaint), and who, in association with approximately seventeen thousand (17,000) other Negroes (approximately nine thousand (9,000) of whom are voters) are being transferred from the present Fourth Congressional District to the newly proposed Seventh Congressional District pursuant to Chapter 980 of the 1961 Laws of the State of New York.

This suit is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and voters similarly situated.

The appellees are: The Governor of the State of New York; the Secretary of State for the State of New York; the Attorney General of the State of New York; the Commissioners of the Board of Elections of the City of New York; and the incumbent Congressman who will run for re-election in the newly proposed Sixth Congressional District.

The complaint alleges that all of the appellees performed or will be required to perform official functions arising out of the legislative congressional re-apportionment act of the State of New York, entitled Chapter 980 of the 1961 Laws of the State of New York; or have the

duty to enforce such law; or will run as a congressional candidate in the very district where the constitutional violation is claimed to exist.

The complaint alleges that the appellants are being denied due process and equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States; and further, that they have been excluded from the newly proposed Sixth Congressional District because of their race and color in violation of the Fifteenth Amendment to the Constitution of the United States.

The complaint alleges two causes of action. The first—that a "color line" was drawn to segregate the Negro from the White citizens, and as a result of which approximately seventeen thousand (17,000) Negroes have been removed from the newly proposed Sixth Congressional District and placed into the newly proposed Seventh Congressional District. That in addition, a second area was taken from the newly proposed Seventh Congressional District and added to the newly proposed Sixth Congressional District and which area consists of only White citizens stopping at that line where colored citizens reside. These two areas, combined with a third area already existing on the southern perimeter of the newly proposed Sixth Congressional District (namely Jamaica Avenue), actually form a "color line" five (5) miles in length, on one side of which line we find exclusively White citizens and on the other side we find exclusively Negro citizens.

On May 10, 1962 plaintiffs presented evidence and witnesses (four (4) in number), to prove that there was in fact a "color line" dividing the White from the Negro, and which line extended itself five (5) miles in length, and which line formed the southern perimeter of the newly proposed Sixth Congressional District and the northern boundary of the newly proposed Seventh Con-

gressional District. Appellants' testimony was *uncontradicted* as indicated in the order of the three-judge statutory court dated May 22, 1962, Appendix C, *infra*.

Reference to the record of the testimony given at the hearing in the district court on May 10, 1962, will indicate the following:

a. The witness, William Nance, testified that he was an American citizen; a member of the Negro race residing in the area which was being removed from the newly proposed Sixth Congressional District and placed into the newly proposed Seventh Congressional District (pp. 12-13); that he objected to Chapter 980 of the 1961 Laws of the State of New York (p. 19); that he signed petitions with others voicing such protest before said law was passed (p. 13) on the ground that the law created a "black belt" (p. 22); that it was segregating the Negro people (p. 24); and that a line was being drawn around an all-colored neighborhood (p. 25).

b. The witness, Walter Sommer, a police officer of the City of New York, testified that he resided in a White area two blocks from the "color line" and that when you came to Hollis Avenue (part of the alleged "color line") and crossed it, you entered a colored area (p. 39); that the part of Springfield Boulevard used as one of the boundaries of the newly proposed lines, actually divides Negro from White (p. 40); that these lines clearly divide Negro from White, and which lines extend from Springfield Boulevard to Hollis Avenue (also part of the newly proposed lines) (p. 41); that Hollis Avenue itself is a "color line" (p. 42); and that Jamaica Avenue is also a "color line" dividing Negro from White (p. 42).

c. The witness Esiah Friedman, a Lieutenant of the Police Department of the City of New York, testified that Archer Avenue is a "color line"; that south of said line

you find only Negro and north of said line you find only White (pp. 52-53); that Archer Avenue has erected thereon for a distance of one and one-half miles, a cement wall which physically divides the White from the Negro (p. 53); that he actually measured, with a scale on a map and the speedometer in his radio car, the total distance of this "color line", south of which you find only Negro and north of which you find only White, and found this distance to be five (5) miles in length (p. 54).

d. The witness Michael Dubin, testified as an expert on congressional re-apportionment, using figures of the 1961 census (p. 69) and obtained his figures from the Census Bureau in Washington, D. C. (p. 70); and which were confirmed by the Board of Health tracts (p. 71); that the present Fourth Congressional District has nineteen thousand (19,000) Negroes and the newly proposed Sixth Congressional District, replacing it has only three thousand five hundred (3,500) Negroes (p. 71); that the appellants—Negroes—are being removed from the newly proposed Sixth Congressional District, which is the smallest congressional district in Queens, and placed into the newly proposed Seventh Congressional District, which is the largest congressional district in Queens (p. 70); that the newly proposed Seventh Congressional District would have ninety-five thousand (95,000) Negroes (p. 72); as compared to the newly proposed Sixth Congressional District with only three thousand four hundred (3,400) Negroes (p. 72); that the study by this expert witness and the figures which he presented in court confirmed the testimony previously given by the police officers, that there was an actual "color line" five (5) miles in length drawn under Chapter 980 of the 1961 Laws of the State of New York (p. 71); that the newly proposed Sixth Congressional District which has two hundred thousand (200,000) voters, will only have fifteen hundred (1,500)

Negro voters therein, (p. 90); and that the lines drawn on the map (Plaintiffs' Exhibit Nos 3 attached to the complaint) were in fact drawn by this witness and is a visual representation of the lines set forth by Chapter 980 of the 1961 Laws of the State of New York. (70).

The record is therefore crystal clear, and *uncontradicted*, that almost the entire southern boundary of the newly proposed Sixth Congressional District, and which, in turn forms the northern boundary of the newly proposed Seventh Congressional District, is a "color line", with White citizens on one side of the street and Negro citizens on the other, for a distance of five (5) miles. That part of this division is in the form of a cement wall, extending itself for a distance of approximately one and one-half miles. That these appellants—Negro citizens, who are entitled to vote in the next congressional election, are being removed from the newly proposed Sixth Congressional District with approximately fifteen thousand (15,000) additional Negroes, taking them from the smallest proposed congressional district in Queens, and placing them into the largest proposed congressional district in Queens. That in the course of such removal, these fifteen thousand (15,000) Negroes of which the appellants are part, are being made to join an additional eighty thousand (80,000) Negro persons to form a "black belt" of approximately ninety-five thousand (95,000) Negro people. That in so removing there has been created a "color line" five (5) miles in length as hereinabove set forth. That such removal from one district into another is clearly based upon segregation between Negro and White and these appellants were only so removed because of their race and color.

The three-judge court initially denied plaintiffs' application for a preliminary injunction by its decision of May

14, 1962 and which decision was rendered two days before respective counsel were to be given the opportunity of submitting briefs (R. pp. 99, 101). This decision set the date of trial for May 21, 1962, before defendants' answers were actually due.

In its amended opinion dated May 17, 1962 the said Learned Court reaffirmed its denial of plaintiffs' application for a preliminary injunction on the ground "that no good cause" has been shown for the granting of such motion. It is respectfully submitted by these appellants that since the Court presiding on the motion for a preliminary injunction has set this cause down for trial, confirmation was thereby given that a *prima facie* case had been made out by the said plaintiffs. Since this *prima facie* case was uncontradicted, as is set forth in the order of the Learned Court itself, dated May 22, 1962, Appendix A, *infra*, the preliminary injunction should have been granted as a matter of law. That the Learned Court abused its discretion in denying plaintiffs' application for a preliminary injunction.

The Question Presented Is Substantial

The question herein presented is substantial because the complaint sets forth, and uncontradicted proof thereof was given at the time of the hearing on plaintiffs' application for a preliminary injunction, the very same issues which were raised in the case of *Gomillion, et al* v. *Lightfoot*, No. 32, October Term, 1960, and decided on November 14, 1960.

The *Gomillion* case established, conclusively, that where legislation is enacted "that segregates white and colored voters, by fencing Negro citizens out" we have a violation of the Fifteenth Amendment to the Constitution of the

United States. In the *Gomillion* case, lines were drawn between white and colored in order to keep the colored from voting in the City of Tuskegee, Alabama. In the case at Bar the lines were drawn, with equal clarity, between white and colored to keep the colored from voting in the newly proposed Sixth Congressional District of Queens. In so doing, this unconstitutional Act removes fifteen thousand (15,000) Negroes, nine thousand (9,000) of whom are voters, from the smallest congressional district in Queens, into the largest.

The record is clear, and the Court may take judicial notice, that of the four (4) congressional districts in the Borough of Queens, the only one which has a Republican incumbent, is the present Fourth Congressional District, which is to become the Sixth Congressional District. That the other three (3) congressional districts are preponderantly Democratic. That obviously, these plaintiffs, and the class they represent are being removed from the newly proposed Sixth Congressional District on the theory that every Negro voter is potentially a Democratic voter, in order to make the newly proposed Sixth Congressional District, safe for the present Republican incumbent.

The record is clear that in the case at bar we have physical division and segregation of races as was the case in the *Gomillion*, for these appellants, and the class they represent, are being removed from the newly proposed Sixth Congressional District solely by reason of their race and color, by a line "as clear a cleavage as a knife drawn right through the district" (R. p. 35). That this cleavage in the form of a "color line" is a highly irregular line" that has an appendix and a curve, indentures and a triangle" (R. p. 35; Plaintiffs' Exhibit No. 3 attached to the complaint).

As in the case of *Gomillion*, and using the words of Mr. Justice Frankfurter:

> "These allegations if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."

To say that these appellants have the right to vote in the newly proposed Seventh Congressional District, even though they have been removed from the newly proposed Sixth Congressional District by reason of their color, is not a valid argument in the same way that the colored who were removed from the City of Tuskegee had the right to vote in the new townships in which they found themselves after having been evicted from the City of Tuskegee.

As Mr. Justice Whittaker stated in his concurring opinion in the case of *Gomillion v. Lightfoot*, 346 U. S. at page 349:

> "* * * But it does seem clear to me that accomplishment of a State's purpose—to use the Court's phrase—of 'fencing Negro citizens out of' Division A and into Division B is an unlawful segregation of races of citizens, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1 * * *."

It matters not that in *Gomillion* new municipal boundaries were established while in the case at Bar new congressional district boundaries were established. What *does* matter is that in both cases the new political boundaries demonstrate a stark pattern of segregation and discrimination against Negro citizens, because in fact they are Negroes. This has been clearly proven, without contradiction, by appellants at the hearing for a preliminary injunction. That there has been a deliberate and purposeful exclusion and removal of approximately fifteen thousand (15,000) Negroes from the newly proposed Sixth Congressional District, cannot be disputed once an examination of the "color line" as drawn, is made.

Mere segregation of races for whatever reason, is a violation of the constitutional rights of the race segregated—in this case the plaintiffs—Negro citizens, and the class they represent.

The Three-Judge Court Presiding Abused Its Discretion in Denying Plaintiffs' Application for a Preliminary Injunction

Having proved a *prima facie* case under the complaint as indicated by the fact that a trial has been requested by the learned Court Presiding; and the plaintiffs' proof having been given without contradiction, the motion for a preliminary injunction should have been granted.

In the case of *Clemons* v. *Board of Education of Hillsboro*, 228 F. 2d 853, the Court of Appeals for the Sixth Circuit, in holding that a denial of the requested injunction was an abuse of discretion, Circuit Judge Allen wrote at page 857:

> "If injunction will issue to protect property rights and to prevent any wrong, it will issue to

protect and preserve basic civil rights such as these for which the plaintiffs seek protection. While the granting of an injunction is within the judicial discretion of the District Judge, *extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights* * * *. Equitable relief by injunction is essential in order to protect these colored children. There is no adequate remedy at law." (Emphasis supplied.)

The wrong, set forth in Chapter 980 of the 1961 Laws of the State of New York, done these plaintiffs is a continuing one, and for which there is no adequate remedy at law.

Conclusion

It is respectfully submitted that this Court has jurisdiction and should hear this appeal and in so hearing said appeal, should reverse the order of the Court below and find that plaintiffs' application for a preliminary injunction against these appellees restraining them from proceeding with the enforcement of Chapter 980 of the 1961 Laws of the State of New York, should have been granted.

Respectfully submitted,

Moses M. Falk,
Attorney for Appellants

APPENDIX A

AMENDED OPINION.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62C423

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALEER, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

MOORE, Circuit Judge, and BRUCHHAUSEN, Ch. J. and ABRUZZO, D. J.

MOSES M. FALK, New York, N. Y., for plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Albany; New York, IRVING GALT, Assistant Solicitor General and SHELDON RAAB, Deputy Assistant Attorney General, Of Counsel, for defendants, NELSON A. ROCKEFELLER, CAROLINE K. SIMON, and LOUIS J. LEFKOWITZ.

LEO A. LARKIN, Corporation Counsel of the City of New York, BENJAMIN OFFNER, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEY, Commissioners of the Board of Elections of the City of New York.

IRVING D. GOLDSTEIN, New York, N. Y., for defendant SEYMOUR HALPERN.

PER CURIAM

After hearing the witnesses produced by plaintiffs and considering their testimony, the exhibits and the arguments upon the hearing and in briefs of counsel for the respective parties, the court is of the opinion that no good cause has been shown for the granting of a preliminary injunction in advance of a trial upon which the facts necessary for a determination of the merits of this action can be fully developed. Hence, the application for a preliminary injunction is denied.

In view of the stipulation made between the parties extending the time of the Attorney General of the State of New York to answer to May 25, 1962, the *Per Curiam* opinion heretofore dated May 14, 1962, is withdrawn. Application may be made to the court to fix a trial date by any of the parties subsequent to May 25, 1962.

S/ LEONARD P. MOORE
U. S. C. J.

S/ WALTER BRUCHHAUSEN
U. S. D. J.

S/ MATTHEW T. ABRUZZO
U. S. D. J.

May 17, 1962

APPENDIX B.

DECISION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

62C423

HENRY HONEYWOOD, FELICIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALTESE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

MOORE, Circuit Judge, and BRUCHHAUSEN, Ch. J. and ABRUZZO, D. J.

PER CURIAM.

Application for a preliminary injunction denied.

Case set for trial at 10:30 A.M., May 21, 1962, Room 312, United States Courthouse, Brooklyn, New York.

S/ LEONARD P. MOORE
U. S. C. J.

S/ WALTER BRUCHHAUSEN
U. S. D. J.

S/ MATTHEW T. ABRUZZO
U. S. D. J.

May 14, 1962.

MOSES M. FALK, New York, N. Y., for plaintiffs.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Albany, N. Y., IRVING GALT, Assistant Solicitor General and SHELDON RAAB, Deputy Assistant Attorney General, Of Counsel, for defendants, NELSON A. ROCKEFELLER, CAROLINE K. SIMON, and LOUIS J. LEFKOWITZ.

LEO A. LARKIN, Corporation Counsel of the City of New York, BENJAMIN OFFNER, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York.

IRVING D. GOLDSTEIN, New York, N. Y., for defendant SEYMOUR HALPERN.

APPENDIX C

ORDER

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 62C423

HENRY HONEYWOOD, FELICIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs,

AGAINST

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHONEY, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants.

Before:

HONORABLE LEONARD P. MOORE, Judge of the United States Court of Appeals, Second Circuit.

HONORABLE WALTER BRUCHHAUSEN, Chief Justice of the United States District Court, Eastern District.

HONORABLE MATTHEW T. ABRUZZO, Judge of the United States District Court, Eastern District.

The above named plaintiffs having moved this three Judge Court for an order granting a preliminary injunction and said motion having been duly heard on the 10th day of May, 1962, in the course of which the plaintiffs presented oral testimony and evidence in support of the allegations contained in the verified complaint, and after hearing witnesses produced by the plaintiffs, and upon filing the decision of this Court dated the 17th day of May, 1962,

Now, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, Albany, New York, Irving Galt, Assistant Solicitor General and Sheldon Raab, Deputy Assistant General, Of Counsel, for defendants, Nelson A. Rockefeller, Caroline K. Simon and Louis J. Lefkowitz; Leo A. Larkin, Corporation Counsel of the City of New York, Benjamin Offner, Assistant Corporation Counsel of the City of New York, Of Counsel, for defendants, Denis J. Malton, James M. Power, John R. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York; and Irving D. Goodstein, New York, New York, for the defendant, Seymour Halpern, it is

ORDERED, that the plaintiffs' application for a preliminary injunction be and the same is hereby denied; and it is further

ORDERED, that application may be made to this Court by any of the parties hereto, subsequent to May 25, 1962 to fix a date for trial of the above entitled action; ~~and it is further~~

~~ORDERED, that the trial of the above entitled action be and the same is hereby stayed pending plaintiffs' appeal from the within order of this Court to the Supreme Court~~

of the United States, upon condition that a legal and proper appeal to the said Supreme Court of the United States be filed forthwith and that said appeal be taken without delay.

Dated: Brooklyn, New York
May 18th, 1962.

LEONARD P. MOORE
LEONARD P. MOORE, U. S. C. J.

WALTER BRUCHHAUSEN
WALTER BRUCHHAUSEN, U. S. D. J.

MATTHEW T. ABRUZZO
MATTHEW T. ABRUZZO, U. S. D. J.

177

No. 7

IN THE

Supreme Court of the United States

October Term, 1961

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

On Appeal From the United States District Court
For the Eastern District of New York

MOTION TO ADVANCE CASE ON THE CALENDAR AND AFFIDAVIT IN SUPPORT THEREOF

Moses M. Falk,
225 Broadway,
New York 7, New York,
Attorney for Appellants.

Lodge Appeal Press, Inc., 41 Vesey Street, New York, N. Y. WOrth 2-0689

Supreme Court of the United States

OCTOBER TERM, 1961

HENRY HONEYWOOD, FREEDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

v.

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

MOTION TO ADVANCE CASE ON THE CALENDAR

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Moses M. Falk, Esq., duly sworn to the 11th day of June, 1962; the order of the United States District Court for the Eastern District of New York dated the 22nd day of May, 1962; the record of hearing dated the 10th day of May, 1962, on appellants' motion for a preliminary injunction; the jurisdictional statement filed herewith; and upon all of the papers and proceedings heretofore had

herein, the undersigned will move this Court at a Special Term, thereof in the Courthouse located in the City of Washington, District of Columbia, on the 14th day of June, 1962, at 11:00 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order advancing the above case on the calendar of this Court, and setting the same down for an immediate determination, and further, if said motion be granted, for an order reversing the order of the United States District Court for the Eastern District of New York, dated the 22nd day of May, 1962, and which order denied the motion for a preliminary injunction, and granting unto said appellants the relief sought in said motion, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 11th, 1962

Yours, etc.,

MOSES M. FALK
Attorney for Appellants
Office & P. O. Address
225 Broadway
New York 7, New York

To:

CLERK OF THE COURT

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York
Attorney for Nelson A. Rockefeller,
Caroline K. Simon and Louis J. Lefkowitz
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80 Centre Street
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LEO A. LARKIN,
Corporation Counsel
Attorney for Denis A. Mahon, James M. Power, John R. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York
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Attorney for Seymour Halpern
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30 Vesey Street
New York 7, New York

ATTORNEYS FOR APPELLEES

Affidavit of Moses M. Falk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

HENRY HONEYWOOD, FELICONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

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Appellees.

State of New York }
City of New York } ss.:
County of New York }

MOSES M. FALK, being duly sworn, deposes and says:

That he is the attorney for the above named appellants, who are the plaintiffs in an action brought for a declaratory judgment, declaring Chapter 980 of the 1961 Laws

of the State of New York, unconstitutional, and for a permanent injunction restraining the said defendants from enforcing the said law as passed.

This action is a class action brought on behalf of the named appellants and all other persons, citizens, taxpayers and voters, similarly situated.

In the course of the proceedings, a motion was made by said appellants for an order granting a preliminary injunction restraining the said defendants, their successors and/or successors in office from the enforcement and execution of Chapter 980 of the 1961 Laws of the State of New York, on the ground that said Act violated the Fourteenth and Fifteenth Amendments to the Constitution of the United States. That the violation was a continuous one, with irreparable injury resulting therefrom. This motion was denied after a hearing, in the course of which appellants produced witnesses whose testimony was *uncontradicted* and which testimony fully confirms the allegations of the complaint.

The Learned Court, although denying the motion for a preliminary injunction, indicated its readiness to hear the trial itself at a subsequent date, affirming clearly that a prima facie case had been made out.

This Learned Court is being respectfully prayed to advance said cause on the calendar and if said motion to advance is granted, to review this appeal from the order of said three-judge statutory court and to reverse the order of the said court, which denied appellants' motion for a preliminary injunction. This motion is made to expedite the said appeal and to have the same heard during the October 1961 Term for the following reasons:

a. That Chapter 980 of the 1961 Laws of the State of New York which appellants claim to be unconstitutional, have fixed new congressional lines of forty-one congressional districts in the State of New York and which new districts will come into being for the November 1962 elections. The boundaries of these new congressional districts are being set forth in maps and descriptions of the said areas in order to acquaint the congressional candidates with the potential areas in which they are to campaign. Literature will be prepared by the said candidates, organizational activity will commence within said areas and a great deal of expense will be incurred by all concerned. Within the next two weeks said congressional candidates will be required to obtain the necessary signatures within the areas defined as congressional districts by Chapter 980 of the 1961 Laws of the State of New York, in order to appear on the ballot for the respective primaries. In addition, the candidates themselves, although it is not mandatory, are generally preferred to be selected among the residents of the district in which they plan to run. It is vital that at the earliest possible moment a determination be made as to whether or not the law concerned is constitutional or not. To permit these preparations on the basis of the lines as drawn pursuant to an Act which, prima facie, is unconstitutional, would cause irreparable injury. An order is urgently required from this Court indicating that a case of unconstitutionality has been made out by these plaintiffs so that all persons may be alerted to the fact that said new lines as drawn, may not be used in November of 1962. There is no adequate remedy at law other than an order of this Court as prayed for. It is anticipated

that the trial of the above action will occur as soon as interrogatories are answered, and should be held in the early summer of 1962.

b. Upon information and belief this Learned Court will recess for the summer period within the next few days. It is therefore urgent that an order be issued setting the within motion down for an immediate hearing and require that all parties to these proceedings waive their rights for filing papers within the stated periods, as provided for pursuant to the rules of this Court.

It is respectfully prayed that this motion, to advance this case on the trial calendar be granted, that all parties in view of the nature of these proceedings waive their rights to all possible delays and to proceed forthwith with a determination of the appeal now before this Court.

WHEREFORE, it is respectfully prayed that this motion to advance the above cause be granted in all respects.

MOSES M. FALK

Sworn to before me this
11th day of June, 1962.

MARIE C. MISGAICH
Notary Public
State of New York
No. 24-7964925
Qualified in Kings County
Commission Expires March 30, 1964

(Seal)

Office-Supreme Court, U.S.
FILED
JUL 11 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 177

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 177

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Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

Appellees Governor, Secretary of State and Attorney General, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, move that the order of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statement of the Case

This is an action to declare that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the Constitution of the United States and to enjoin defendants from enforcing or executing that statute. Appellants have appealed from an order denying a preliminary injunction against enforcement of Chapter 980.

The statute in question redistricts New York for the purpose of the forthcoming Congressional elections; it was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2(a).

In their complaint, appellants allege that they are residents of the former Fourth Congressional District, and that the "Fourth Congressional District is practically identical with the new Sixth Congressional District except that certain neighborhoods which are part of the Fourth Congressional District, have been excluded from the new Sixth Congressional District, while other neighborhoods, not a part of the Fourth Congressional District, are included in the new Sixth Congessional District" (Complaint, par. 9). Appellants allege that they have not been included in the new Sixth District. They go on to allege that the redistricting "was solely for the benefit of the present congressional representative, the political party he represents, and not for the well-being of the citizens of the [former] Fourth Congressional District * * *". Furthermore, they allege (par. 11) that they are the victims of a "purposeful and systematic drawing of boundary lines to 'fence the Negro citizens out' of the new Sixth Congressional District." Except for an allegation that a number of Negro voters, formerly residents of the Fourth Congressional District, have not been included in the new Sixth District, the verified complaint is bare of

evidentiary facts showing either deliberate racial discrimination or partisan considerations in redistricting.

Appellants moved for a preliminary injunction restraining enforcement of Chapter 980 pending final disposition of the action. At a hearing held before a three-judge statutory court on May 10, 1962 (MOORE, Cir. J., BRUCHHAUSEN and ABRUZZO, D. JJ.), they were unable to produce any evidence to support the charges made in the complaint. Four witnesses testified: William Nance testified that he was a resident of the affected area and objected to the redistricting; Walter Sommer and Esiah Friedman testified that the southern boundary of the new Sixth District coincided with the northern boundary of the Negro neighborhood; finally, Michael Dubin testified that a neighborhood that used to be part of the old Fourth District, but is not part of the new Sixth, was predominantly Negro. Mr. Dubin admitted, under examination by the Court, that the district to which this neighborhood was transferred—the new Seventh District—had about the same ratio of Negro to white voters after the redistricting act as it had before the challenged Act was passed (Transcript, p. 89). On May 14, the three-judge court denied appellants' application for a preliminary injunction and set the case for trial on May 21, 1962 (Jurisd. Statement, p. 15). On May 17, the Court, in an amended opinion, declined to fix a specific date for trial (Jurisd. Statement, p. 14) in light of a stipulation between the parties extending the time for defendants to move or answer:* Instead, it provided that either party might move for trial at any time after May 25th. The Court reiterated its holding that no good cause had been shown for the granting of a preliminary injunction in advance of trial.

Thus, under this order, appellants could have obtained an early adjudication of the merits of their claims. How-

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* Appellees Governor, Attorney General and Secretary of State served and filed their answers on May 22, 1962.

ever, they chose not to press for an early trial. In fact, they asked the three-judge District Court to stay the trial pending the disposition of this appeal (Jurisd. Statement, p. 18); that application was denied.

Appellants then brought the instant appeal, and moved to advance it on the calendar. The motion to advance was denied on June 25, 1962.

Argument

Of course, the order denying preliminary injunctive relief should be disturbed only if the court below abused its discretion. *United Fuel Gas Co.* v. *Public Service Comm. of West Virginia*, 278 U. S. 322 (1929); *Alabama* v. *United States*, 279 U. S. 229 (1929). Indeed, it is significant that appellants have failed to comply with Rule 15(g) of this Court, which requires that they indicate specifically how the District Court abused its discretion. This omission alone is dispositive of the instant appeal.

Moreover, there can be no doubt that the District Court correctly denied appellants' application for a preliminary injunction. Appellants failed to produce facts to support their allegations; and there was a serious question whether they had even stated a legally sufficient claim. In the face of the grave doubts which perforce surrounded appellants' unsupported and somewhat nebulous allegations, their demand for such drastic relief—which would destroy New York's present system of Congressional districting—was sheer frivolity.

A. Appellants' evidence was insufficient to warrant a preliminary injunction.

Assuming arguendo that appellants' unsupported allegations of improper legislative motive could survive a motion to dismiss the complaint, these allegations and the evidence presented at the May 10 hearing nevertheless were

clearly insufficient to warrant the issuance of a preliminary injunction. The burden of alleging facts supporting the need for a preliminary injunction is on the plaintiffs; and this burden is not satisfied by the general allegations of purposeful discrimination that appear in this complaint. Evidentiary facts—conspicuously lacking here—must be presented. *Sims* v. *Greene*, 161 F. 2d 87 (3rd Cir. 1947); *Aeolian Co.* v. *Fischer*, 29 F. 2d 679 (2d Cir. 1928); *Behre* v. *Anchor Ins. Co.*, 297 Fed. 986 (2d Cir. 1924); *Washington Basketball Corp.* v. *National Basketball Ass'n*, 131 F. Supp. 596 (S.D.N.Y. 1955). It must appear from these facts that appellants' right to ultimate relief is reasonably free from doubt, or a preliminary injunction against State officials may not be granted. *Pearl Assur. Co.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), *aff'd*, 313 U. S. 549 (1941); *Vergas* v. *Shaughnessy*, 97 F. Supp. 335 (S.D.N.Y. 1951); *Ross* v. *Neuville*, 34 F. Supp. 466 (E.D.N.Y. 1940).

There was no such showing here. The verified complaint contained no evidentiary facts at all except for some statistics which purported to show that a number of Negro voters who were part of the old Fourth Congressional District were not included in the new Sixth District. Neither did the evidence presented at the hearing add any further support to the allegations; appellants' witnesses testified only that the southern boundary of the new Sixth District coincided with the northern boundary of the Negro neighborhood. It is difficult to draw any inference from that fact alone, since it was inevitable that the results of the 1960 census would lead to a shift in district lines.

This feeble attempt to support appellants' very serious charges highlights the contrast between this case and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). Although this complaint is clearly designed to capitalize upon *Gomillion*, it falls far short of the mark. First, *Gomillion* went up on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)6; and this Court expressly disclaimed any con-

cern with the truth of the allegations (*Id.*, at 341). The diametric opposite is true of a hearing on application for preliminary injunction. Second, *Gomillion* involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, thus depriving these voters of the benefits of residence in that city such as the right to vote in municipal elections. This, the Court noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (*ibid.*)—language borrowed by the appellants in the instant case—and the Court went on to state that the situation was "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters . . ." And, against this claim, the City authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries. Here, again, we have the very opposite of the *Gomillion* situation. The justification for the redistrictng is clear: New York lost two Congressional seats as a result of the 1960 census. The mathematics of the redistricting is not at all startling: 20% of the Negro voters of the old Fourth District became voters of the new Sixth District (Par. 10, p. 7). Most important, appellants suggest no reason why anyone would prefer to exclude Negro voters from the Sixth District only to be forced to include them in an adjoining District. This is a far cry from the *Gomillion* situation, where the City authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections and deprive them of municipal services. In fact, it is difficult to make out any claim of disenfranchisement at all on the facts of the instant case.

As to the claim of political gerrymandering, there was not a shred of evidence advanced in the verified complaint or at the hearing.

Every application for preliminary injunction must be supported by factual proof, as we have noted. In the instant case, we submit that such proof must be even stronger than is normally required. For the complaint, in essence, attacks legislative motive—this nebulous concept, even if it were amenable to proof, is at best enormously difficult to prove. Cf. *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961). To show a reasonable chance of success in this action, appellants would have had to demonstrate that they could rise to these difficulties.

In any event, they have yet to advance one iota of factual evidence that reasonably supports their position. There was absent any basis whatsoever to justify their application for a preliminary injunction.

B. There was serious doubt whether the complaint stated a claim upon which relief could be granted.

In order to obtain a preliminary injunction, it is obvious that appellants had to show not only facts to support their allegations but also that they state a claim whose legal merit is reasonably free from doubt.. *Pearl Assur. Co.* v. *Harrington*, 38 F. Supp. 411 (D. Mass. 1941), *aff'd*, 313 U. S. 549 (1941). We submit that they have not done so in this case.

First, under the Civil Rights Acts, a complaint must state facts, not merely conclusory allegations. *Snowden* v. *Hughes*, 321 U. S. 1 (1944); *Walker* v. *Bank of America Ass'n*, 268 F. 2d 16, 24 (9th Cir.), *cert. denied*, 361 U. S. 903 (1959); *Ortega* v. *Ragen*, 216 F. 2d 561, 563 (7th Cir. 1954), *cert. denied*, 349 U. S. 940 (1955). As we have already indicated in Point I, *supra*, this complaint is woefully deficient in this respect. Especially where, as here, it is crucial to show an intentional or purposeful discrimination, the failure to do so invites a motion to dismiss. *Snowden* v. *Hughes*, *supra*, at 8-9.

Second, the issues raised by the complaint appear to be nonjusticiable under the standards articulated in *Baker* v. *Carr*, 369 U. S. 186 (1962). The classic example of a nonjusticiable issue—the political question—is characterized by a lack of satisfactory criteria for judicial determination and the vesting of ultimate responsibility in another branch of government. *Baker* v. *Carr*, *supra*, at 210, 217, 226.

The Congress, and not the Courts, have the ultimate responsibility for determining the manner of electing Representatives. U. S. Const. Art. I, §§ 4, 5. Appellants' claim that the legislature has favored one party over another in drawing district lines is clearly not amenable to criteria normally employed by the judiciary; indeed, it is almost impossible to imagine "neutral" standards for drawing district lines. The only meaningful Congressional standard, requiring that districts be contiguous and compact, has long since lapsed. *Wood* v. *Broom*, 287 U. S. 1 (1932). And there is absent here the allegations of gross numerical inequality which made the complaint in *Baker* v. *Carr*, *supra*, amenable to judicial resolution.

The complaint of racial discrimination, while it might be justiciable in a proper case, adds no strength to the instant complaint. Appellants allege only that Negro voters were shifted from one Congressional District to another. Absent a showing that these voters are in some way prejudiced, this allegation is of no legal significance; it is merely an attempt to circumvent the "political questions" doctrine by superimposing an incongruous and inapposite claim borrowed from the entirely different situation presented in *Gomillion* v. *Lightfoot*, *supra*.

The complaint fails for a third and even more fundamental reason. Basically, it is an unsupported foray into legislative motive—a task which, absent the superficially obvious discriminatory purpose revealed in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), is neither competent nor

wise for the Courts to undertake. The attempt to taint New York's Congressional redistricting with a kind of legislative *mens rea* imagine a single "motive" for a large deliberative body; and that imagination is completely without support in reality. See *McGowan* v. *Maryland*, 366 U. S. 420, 425-26, 468-69 (1961); *Kotch* v. *Board of Pilot Comm'rs.*, 330 U. S. 552 (1947).

Since there was—to say the least—substantial doubt as to the legal sufficiency of the complaint, the three-judge Court properly denied a preliminary injunction.

C. The District Court properly denied a preliminary injunction under settled principles governing the exercise of equitable discretion.

Under settled principles of equity, plaintiffs failed to show the need for a preliminary injunction.

First, they failed to sustain the burden of showing that they will suffer irreparable injury if a preliminary injunction is not granted. This is a sin qua non for the relief sought. *Foundry Services, Inc.* v. *Beneflux Corp.*, 206 F. 2d 214 (2d Cir 1953); *Sims* v. *Greene*, 161 F. 2d 87 (3rd Cir. 1947). Yet, they alleged no facts showing irreparable injury and contented themselves with a bare conclusion to that effect. In fact, it was shown at the hearing (Transcript, pp. 93-94) that there was no immediate threat to appellants' interests since the nominating petitions were not due until August 7—nearly three months after the date on which appellants' application for a preliminary injunction was heard. Moreover, appellants specifically abjured any special concern with the forthcoming election (p. 95). And, of course, under the District Court's amended opinion, appellants have had an opportunity—since May 25—to move for an early trial. Thus, if they were entitled to the ultimate relief requested, they would be able to obtain a permanent injunction in a short time

and they would not need a preliminary injunction. Yet, they have not moved for trial. It is difficult to reconcile appellants' apparent lack of interest in an early adjudication of the merits with their claim of immediate and irreparable injury.

Second, even if there were facts tending to show irreparable injury, the District Court nevertheless was justified in denying relief. *Cf. Progress Development Corp.* v. *Mitchell*, 182 F. Supp. 681, 711 (N. D. Ill. 1960), *rev'd on other grounds*, 286 F. 2d 222 (7th Cir. 1961). To grant the injunction would be to give appellants a very substantial part of the relief they seek to attain at the end of the entire proceeding. *Foundry Services, Inc.* v. *Beneflux*, 206 F. 2d 214 (2d Cir. 1953). Under these circumstances, it would be manifestly unfair to appellees and, indeed, to the citizens of New York and their elected representatives, to frustrate their expressed intention before appellants were put to the test of proving—if that were ever possible—their as yet unsupported contentions.

Third, it must be remembered that a weighty public interest is involved in this proceeding. No injunction bond, no security could possibly compensate the citizens of the State of New York for the incalculable harm that would result from preliminary injunction. We need hardly labor the enormous implications of an election at large or even of a hastily drawn redistricting plan. Moreover, it should be noted that this complaint dwelled only on alleged inequities in one Congressional district among the forty-one set up by the challenged statute. Yet, if the preliminary injunction were granted, it would have affected the entire redistricting plan. It is clear, under these circumstances, that a court of equity need not grant a preliminary injunction—even if appellants show irreparable injury (which they have not done). *Yakus* v. *United States*, 321 U. S. 414, 440-41 (1944).

CONCLUSION

This appeal presents no substantial questions of public importance. The United States District Court did not abuse its discretion, and it correctly determined the issues involved. Therefore, the order should be affirmed or the appeal dismissed.

Dated: New York, N. Y., July 10, 1962

Respectfully submitted,

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